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No. 85-276

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

A. L. LOCKHART, Director,
ARKANSAS DEPARTMENT OF CORRECTION,
Petitioner,

v.

JAMES DEAN WALKER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, on the particular facts of this case, the Court of Appeals correctly decided that the well-established ends of justice standard of *Sanders v. United States*, 373 U.S. 1 (1963), required that habeas relief be granted.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL, COURT RULES, AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASON FOR DENYING THE WRIT	5
I. The Court of Appeals Correctly Decided on the Basis of the Entire Record That Respondent Was Denied a Fair Trial and That the "Ends of Justice" Standard Required the Grant of Habeas Relief	5
II. The Court of Appeals Correctly Applied the Well-Established Standard of Review for Cases Involving Official Misconduct and Suppression of Evidence	8
III. The Court of Appeals Properly Examined the Entire Record in Reviewing Factual Findings Made by the District Court Pursuant to a Limited Remand	11
IV. The Court of Appeals' Ruling Regarding the Kumpe-Eisner Transcript Was Correct	13
CONCLUSION	17
APPENDIX	A1

TABLE OF AUTHORITIES

CASES: Page

Anderson v. City of Bessemer, —— U.S. ——, 105 S. Ct. 1504, 84 L.Ed. 2d 518 (1985) 16
Giglio v. United States, 405 U.S. 150 (1972) 9
Napue v. Illinois, 360 U.S. 264 (1959) 9
Sanders v. United States, 373 U.S. 1 (1963) 2, 3, 5
United States v. Agurs, 427 U.S. 97 (1976) 8
Walker v. Lockhart, 726 F.2d 1238 (8th Cir. 1984) 6
Williams v. Griswald, 743 F.2d 1533 (11th Cir. 1984) 9

STATUTES:

Ark. Stat. Ann. 28-1001, Rule 901(a) (Repl. 1979) 13

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent James Dean Walker respectfully requests this Court deny the Petition for Writ of Certiorari, seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears as *Walker v. Lockhart*, 763 F.2d 942 (1985). Respondent has also included the concurring opinion by Judge Richard Arnold which is reproduced in the Appendix, *infra*.

JURISDICTIONAL STATEMENT

The Opinion of the United States Court of Appeals for the Eighth Circuit was delivered on May 17, 1985. No Petition for Rehearing was filed.

The petitioner asserts that jurisdiction is conferred by Title 28 United States Code, Section 1254(1).

CONSTITUTIONAL, COURT RULES, AND STATUTORY PROVISIONS INVOLVED

It is admitted that these provisions are set forth on pages two and three of the petition.

STATEMENT OF THE CASE

This is a case based on peculiar facts that are likely never to be presented in another habeas petition. The Court of Appeals has dealt with these instances of reprehensible official conduct by using guidelines and legal principles set down by this Court in *Sanders v. United States*, 373 U.S. 1 (1963), and other cases. Furthermore, the decision of the Court of Appeals is to do justice. This is not the case of a prisoner whose guilt is overwhelming being freed on some minute technicality; this is a case where an unusual factual situation, a grossly prejudiced judge, and decades of official suppression have distorted the fact-finding process and have imprisoned an innocent man. The Eighth Circuit Court of Appeals has merely applied existing guidelines to reach the result which is legal, logical, but perhaps more importantly, just and humane. The Petition for Certiorari should be denied.

The chain of events referred to by the Eighth Circuit Court of Appeals as a "stain on our criminal justice system" began on April 16, 1963, when a North Little Rock, Arkansas, police officer was killed. The subsequent acts of police suppression of evidence, tampering with evidence, prosecutorial misconduct, and judicial bias—some of which only came to light in September of

1984—resulted in the substantial probability that James Dean Walker remained incarcerated in 1985 under a life sentence for a murder that he had not committed twenty-two years ago. The Eighth Circuit used the "ends of justice" standard of *Sanders v. United States*, 373 U.S. 1 (1963) to grant Respondent relief from these decades of official misconduct.

The factual situation cannot be more succinctly stated than in the Eighth Circuit opinion. James Dean Walker's gun was fully loaded and never fired. There were no paraffin tests or fingerprint tests to link Walker with the murder weapon, a gun admittedly owned and, according to the newly discovered evidence, perhaps fired by Russell Kumpe, who was also on the scene. The State's theory of the case rested on the incredible scenario of Walker shooting the police officer at point blank range in the heart with a .38 caliber bullet so as to cause instantaneous death but with said officer *after* being shot being able to fire his gun six times with five of the bullets striking Walker in a foot and a half radius.

Walker was convicted before a judge who stated before the trial that he intended to "burn the S.O.B.", referring to Walker. In voir dire, said trial judge twice told the jury that Walker had already been convicted, that the Supreme Court had reversed his case and was giving him a new trial, and this was the new trial. The prosecuting attorney in the first trial had postulated the theory that Walker had been shot by the partner of the deceased officer despite knowledge on the prosecuting attorney's part, not shared with defense counsel, that ballistics showed that the five bullets in Walker came from the revolver of the deceased officer. When Walker's attorney attempted to have the gun of the other police officer tested, the barrel of same had been sawed off rendering ballistics tests impossible. All of the initial witness statements were "lost" and never recovered. An eye-witness who gave testimony exculpatory of James

Dean Walker which incriminated the driver of Walker's vehicle, Russell Kumpe, was never produced nor revealed by the police, even though such witness testified after the trial that he had made his knowledge available to the officials.

Most incredibly, in September 1984, revelation surfaced that the major police expert witness in the trials of Walker, a former head of the Criminal Investigative Division of the Arkansas State Police, had had in his possession for 22 years a surreptitiously recorded statement of Russell Kumpe to the effect that Kumpe had fired a shot at the police officer on the night in question. Given the fact that the only fired gun on the scene, other than the police guns, was the murder weapon, the significance of this statement cannot be overemphasized. Walker who was right handed had his gun in his hand, fully loaded and never fired. Given the admitted fact that the murder weapon belonged to Kumpe, Kumpe's admission that he had fired a gun literally takes the murder weapon out of James Dean Walker's hands. Yet in the face of sweeping discovery orders, an appeal to the Arkansas Supreme Court, a habeas petition in the federal district court, and an appeal to the Eighth Circuit Court of Appeals in the 60's, a second habeas in 1981, and an appeal to the Eighth Circuit, the State never revealed such document. Only shortly prior to the evidentiary hearing ordered by the Eighth Circuit in 1984 did the State release this document.

It is against this deplorable factual background of official suppression and misconduct that the Eighth Circuit Court of Appeals saw fit to grant James Dean Walker relief. It is contended strongly that this is not a case of abuse of the successive habeas doctrine. This is the first time that any court apprised with *all* the suppressed facts has had a chance to rule on James Dean Walker's petition for relief. Factually, this is truly the case of an innocent man, wrongfully convicted by official

judicial, prosecutorial, and police misconduct and wrongfully kept in prison by continued suppression of evidence. The Court of Appeals, after carefully reviewing the entire record, properly concluded that this is exactly the situation envisioned by this Court's enunciation of the ends of justice standard of *Sanders v. United States*, *supra*. The Petition for Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Decided on the Basis of the Entire Record That Respondent Was Denied a Fair Trial and That the "Ends of Justice" Standard Required the Grant of Habeas Relief.

First of all, the significance of newly discovered evidence should be evaluated in the context of the entire record. A review of such record indicates that James Dean Walker's counsel moved to disqualify the Arkansas trial judge as being grossly prejudiced. Three ministers were called and they testified about asking Judge William Kirby to allow Walker to be baptised. In testifying about the conversation the ministers had with Judge Kirby, Reverend Ray Branscum stated:

> "We came to the judge's office and made our request known here to Judge Kirby. Judge Kirby expressed himself in saying that he didn't have any confidence in James' profession (i.e. of faith) and that he had killed a man, but he did, in turn, make the statement to Mr. Hallum (the chief deputy) that he was going to grant the request but he wanted him heavily guarded and if James made a move to shoot him down, because he didn't want him brought back to him because he intended to burn the S.O.B. anyway". 726 F.2d at 1255.

In response to this testimony, Judge Kirby stated:

> "I wouldn't say I didn't say it, but I certainly misrepresented it if I said it. I have nothing to do with burning him. It is up to the jury whether or

> not he gets that sentence. All I have to do is call the shots as I see them and give him a reasonably fair trial. It is not up to me to burn him or punish him. *If it was, we wouldn't have to have this trial*". 726 F.2d at 1255 (Emphasis in original).

Very early Judge Kirby had let his attitude about Walker communicate itself to the potential jurors in voir dire by stating:

> "By way of explanation, I might say to the jury that this is the second time that this case has been tried, or will be the second time. Mr. Walker was tried once and convicted and the Supreme Court reversed it and sent it back here for a retrial, and this is the retrial, ladies and gentlemen". 726 F.2d at 1255-1256.

Throughout the trial, numerous discretionary rulings were made by said trial judge against James Dean Walker. These are aptly chronicled in Judge Bright's dissenting opinion in *Walker v. Lockhart*, 726 F.2d 1238 (8th Cir. 1984). In the words of Judge Bright:

> "Due process requires "[a] fair trial in a fair tribunal." *In Re Murchison*, 349 U.S. 133, 136 (1955). Moreover, "justice must satisfy the appearance of justice". *Offutt v. The United States*, 348 U.S. 11, 14 (1954). Can a trial before a judge who admits his deeply held bias against the defendant satisfy the appearance of justice? Can such a judge do justice? We think not. 726 F.2d at 1259.

Later in the opinion, Judge Bright pointed out the manner in which the actions of Judge Kirby had distorted the fact finding function of the jury:

> "In short, Judge Kirby admitted he was prejudiced, and his actions supported his words. Judge Kirby's prejudice permeated Walker's entire second trial, thus depriving him of his constitutional right to a fair trial". 726 F.2d at 1260.

In the context of this gross judicial prejudice, one must consider the alleged suppression of the witness Aaron

Paul Alderman, who gave a version of the event which would have been exculpatory toward James Dean Walker and would have implicated Russell Kumpe as the person firing the murder weapon. In the same light is the undisputed fact that the gun in James Dean Walker's hand was fully loaded and never fired, and the implausible scenario of the deceased officer being able to fire six bullets with five of them striking Walker in a radius of a foot and half *after* being shot in the heart and dying "instantaneously", to quote the pathologist in the first trial.

It is undisputed that the only guns fired were the murder weapon, which belonged to Russell Kumpe, and the police revolvers. There was a gun in Walker's right hand, and a gun in the car, but it is undisputed that neither of these was fired. In this context, evidence that Russell Kumpe had written in his diary of firing a gun too high on April 16, 1963, is truly significant. Testimony that Russell Kumpe told his wife that he had killed the officer is likewise equally exculpatory. Both of these pieces of evidence would certainly tend to indicate that Kumpe had fired the murder weapon, his gun, and literally take the murder weapon out of the hand of James Dean Walker, since this was the only gun fired on the scene other than the police guns.

But even more significant is the fact that the record shows that the chief police officer in both of Walker's trials, the head of the Criminal Investigative Division of the Arkansas State Police, had in his possession a transcript of a surreptitiously recorded conversation between Russell Kumpe and his sister, Mildred Eisner (now deceased) who was visiting Kumpe at the Arkansas penitentiary. This transcript, dated November 12, 1963, includes the following statement by Kumpe:

> "Now look, I am going to explain something to you. You understand that I did shoot at that policeman and he will go crazy trying to figure out what

> happened to the gun. If they placed the gun in my hand, naturally they could, no, they couldn't either, cause (sic) I had been back in his custody, I don't know what they could have done and at the time I didn't care for (sic) everybody was shooting at everybody else and I had some things on me that would have got me a hundred years. I had to get rid of them." 763 F.2d at 942.

It was in the light of this background of judicial bias and more than colorable claims of innocence that the Court of Appeals evaluated the Kumpe diary entry and the Kumpe-Eisner transcript.

II. The Court of Appeals Correctly Applied the Well-Established Standard of Review for Cases Involving Official Misconduct and Suppression of Evidence.

Contrary to the assertion of the State of Arkansas, the Eighth Circuit neither enunciated nor applied a new standard of review for newly discovered evidence in habeas cases. The standard utilized—whether "the omitted evidence creates a reasonable doubt that did not otherwise exist"—is squarely from existing precedent of this Court. See 763 F.2d at 957. It should be pointed out that this is a case where there have been sweeping discovery orders for decades and the State had never turned over the Kumpe-Eisner transcript, even with its obvious significance.

In this context, the standard announced in *United States v. Agurs*, 427 U.S. 97 (1976), is clearly applicable. There it was held that the prosecutor had the duty to disclose exculpatory evidence to the defendant, even absent a request by the defendant, when the evidence "is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed." 427 U.S. 110. Further, in the words of this Supreme Court:

> "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise

> exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 427 U.S. at 112-113.

It is clear that the knowing use of material false evidence by the state in a criminal prosecution violates due process. See *Giglio v. United States*, 405 U.S. 150 (1972). Likewise, this rule applies when the state, although not soliciting perjured testimony, allows it to go uncorrected after learning of its falsity. See *Giglio, supra.* In such situations, one then confronts the standard of whether the testimony involved is material. The standard set forth by *Giglio* with regard to materiality is as follows:

> "A finding of materiality of evidence is required under *Brady, supra* 87. A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . ." 405 U.S. at 154.

Also see *Napue v. Illinois*, 360 U.S. 264 (1959), and *Williams v. Griswald*, 743 F.2d 1533 (11th Cir. 1984).

The standard of review by the Eighth Circuit is in no way a new, never before announced standard by which to judge newly discovered evidence as charged by the State. It is merely a reflection of the holdings of this court in *Agurs* and *Giglio, supra.* It applies in cases when there has been official misconduct resulting in the suppression of evidence or knowingly allowing false testimonies to stand uncorrected. This situation is more than met by the deplorable action of the head of the Arkansas State Police Criminal Investigative Division serving as a witness against James Dean Walker under a theory that James Dean Walker had fired Kumpe's gun, the

murder weapon, when he had a document in his file indicating that Kumpe had fired this murder weapon. This police officer had performed the ballistics test and he knew that only one gun other than the police guns had been fired. Allowing this false version of events to stand and allowing James Dean Walker to remain convicted for 22 years for a murder he did not commit is official misconduct of the basest variety. The Eighth Circuit Court of Appeals merely followed existing precedent set by the Supreme Court as to the standard for reviewing materiality of such evidence suppressed by official misconduct.

Furthermore, as to the diary and the statement that Russell Kumpe made to his ex-wife and others about committing the murder, the language in *Agurs*, *supra*, about additional evidence of relatively minor importance being sufficient to create a reasonable doubt in a case when the verdict is already of questionable validity is very applicable. Given the almost nonexistent factual underpinnings on which this verdict is premised and the blatant prejudice of the trial judge, the diary entry showing that Kumpe fired a gun on the night in question should, by itself, have been sufficient to satisfy the *Agurs* test of materiality. Under either analysis, the Eighth Circuit did not depart from existing legal precedent in the standard of review as to the materiality of the newly discovered evidence.

An attack is also made that the Court of Appeals violated the presumption of correctness of state court findings. However, it should be pointed out that James Dean Walker was never able to present the matter of the Kumpe-Eisner transcript to any state court because it was suppressed for 22 years. Further, any issue of exhaustion of state remedies was waived. See 763 F.2d at 956. Likewise, because of its suppression by the prosecutor, no state court has considered the testimony of Aaron Paul Alderman, which also indicates that Kumpe, not Walker, fired the fatal bullet. It is incredible that

the State could seriously argue that the suppressed Kumpe-Eisner transcript could not be considered in Walker's habeas petition because of such a doctrine. If this appellate argument is addressed only to the judicial bias issue, then respondent's position is that the statements of the trial judge about "burning the S.O.B." which are in the record amount to a question of law, and that clearly a federal court in a habeas action has a right to declare that a judge who makes such statements before a defendant is tried before him that he wants to burn the prisoner is offending the concept of the appearance of impartiality.

III. The Court of Appeals Properly Examined the Entire Record in Reviewing Factual Findings Made by the District Court Pursuant to a Limited Remand.

The remaining argument made by the state is that the Eighth Circuit violated the clearly erroneous standard regarding the federal district court's fact finding. Respondent's answer to this argument is two-fold. First of all, the role of the district court with regard to the Kumpe diary, the Kumpe statement, and the Kumpe-Eisner transcript was very limited. The district judge's role had been narrowly defined by the Eighth Circuit with regard to certain designated issues; the whole record had been reviewed painstakingly by the Eighth Circuit which had directed the district court's evidentiary hearing to supplement the existing record. It was in the context of the whole record that the Eighth Circuit had to evaluate the "ends of justice" standard—not the limited issues evaluated by the district court. The district court was not familiar with the entire record as is demonstrated by the suggested theory of the crime set forth in the district court's opinion (A. 79) which clearly contradicts the state's trial theory that Walker intentionally fired the first shot. In other words, Kumpe's testimony that Officer Vaughan first shot at Walker is completely at odds with the State's theory on which Walker was convicted, but the

district court did not attach significance to this statement because the district court had not reviewed the entire record as had the Court of Appeals.

In the second place, the district court was directed in the remand order setting up the evidentiary hearing to consider whether any of the evidence was credible enough to deserve the attention of a jury. It appears that the district court, instead of making that determination, attempted to make his own assessment of the credibility of the evidence.

It was not for the district court, or even the appellate court, to decide whether they believed the new evidence but whether such new evidence should be heard by the real factfinder; the jury. This is more a question of law than fact. Were the standard of review as suggested by Arkansas, such rulings by the district court would be completely unreviewable.

Furthermore, the question of whether the ends of justice standard has been satisfied is a mixed question of fact and law. In light of the existing record, the suppressed Kumpe-Eisner transcript indicating that Kumpe fired a gun, when the only non-police gun fired was the murder weapon, is clearly material. Any suggestion that this is not credible enough evidence to deserve the attention of a jury would be a clearly erroneous finding under the applicable Federal Rules.

In its basic form, the State's petition simply asks this Court to overlook the clear evidence in the record as to official suppression and misconduct by state officials and to ignore the more than colorable contention that James Dean Walker is truly innocent. The purpose of the "Great Writ" is to grant a vehicle to free the innocent from the results of official unconstitutional conduct. The state in no way in its Petition for Certiorari attempts to justify the unconstitutional conduct with which it was charged by the Eighth Circuit.

IV. The Court of Appeals' Ruling Regarding the Kumpe-Eisner Transcript Was Correct.

The key to the Eighth Circuit ruling regarding the Kumpe-Eisner transcript is set forth at 763 F.2d 942 as follows:

> Walker contends that the Kumpe-Eisner Transcript contains exculpatory evidence, that it has been in the State's possession for over twenty years, and that the State's failure to disclose it—despite sweeping discovery requests and a 1967 court order directing the State to turn over all material held on James Dean Walker—creates an independent basis for granting habeas relief. We agree. Although the transcript is relevant to the "ends of justice" analysis, the State's suppression of this exculpatory material constitutes a separate and independent ground for relief which we now review for the first time.

The Court of Appeals pointed to Rule 901(a) of the Arkansas Rules of Evidence which provides: "[T]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." See Ark. Stat. Ann. 28-1001, Rule 901 (a) (Repl. 1979). There was an adequate legal basis for concluding that the nature of the document itself and the location in which it was found, together with Kumpe's own testimony, established adequate authentication to render the transcript admissible.

Paul McDonald, chief firearms examiner for the Arkansas State Crime Laboratory and formerly the head of the Criminal Investigation Division of the Arkansas State Police, suggests in his testimony that the transcript probably came into his possession through a "liaison man" stationed by the Arkansas State Police at the penitentiary where Mildred Eisner visited Kumpe. He recognized the document as originating at the peniten-

tiary. Further, Kumpe's own testimony served to authenticate the transcript. He did not deny making the statement "you understand that I did shoot at that policeman". His explanation for making the statements were that he was pressuring his sister to take action.

The content of the document, the age of the paper, its date, and location, in combination with the testimony of Paul McDonald and Kumpe, provide an overwhelming basis in support of admissibility. Furthermore, such document would certainly be admissible for impeachment purposes on the same basis as Kumpe's diary entry given the statements made by Kumpe about the reason he made the statement to his sister.

In oral argument before the Eighth Circuit in January, 1985, the State suggested an incredible explanation for the document. The Assistant Attorney General speculated that some supporter of Walker might have sent the document to Captain McDonald so it could be put into his locked safe and might have heated up some paper to make it look a lot older than it was! Perhaps nothing better serves to illustrate the incredible lengths to which the State of Arkansas has gone to attempt to uphold the conviction of James Dean Walker.

The chief police witness against Walker was the same Paul McDonald in whose possession said document finally surfaced. He testified as a ballistics expert at both trials and in the 1967 habeas proceeding. Knowing that the only gun fired at the scene other than a police gun was the murder weapon, the significance of Kumpe's having told about firing a gun could not have been lost on this officer. If this had been revealed at an earlier time, Kumpe's sister, Mildred Eisner, now deceased, could have been contacted about this as well. It is absolutely incredible that the State could suppress such a document for twenty-one years and then postulate the ridiculous hypothesis given to the Court of Appeals in oral argu-

ment that one of James Dean Walker's supporters may have been able to "heat up" a document and somehow get it into a locked safe in the state crime lab.

In the same vein is the State's ignoring a video tape interview with reporters in which Paul McDonald conceded that the document had been "around since 1963" and engaged in the following colloquy:

> Reporter: You found this report only recently?
>
> McDonald: Not recently.
>
> Reporter: Well, here's what I want to know: Why—this is dated 1963—that's twenty-one years ago. Why is this just now being turned over to any attorneys—defense attorneys, prosecuting or anyone.
>
> McDonald: I don't know.
>
> Reporter: But you knew about this in 1963.
>
> McDonald: In 1963, I did.
>
> Reporter: You knew that Russell Kumpe said that he fired the shot at the policeman?
>
> McDonald: I did.
>
> Reporter: This wasn't considered crucial enough to turn over, Mr. McDonald?
>
> McDonald: I don't know. That came from the Penitentiary. 763 F.2d at 958.

The same McDonald at the evidentiary hearing a few days later testified that he had no knowledge of the transcript during the 1960's. He stated that he recalled seeing the transcript before 1984, but he could not remember when. He believed that it may have been within the past ten years, but he could not explain how a document dated 1963 would suddenly show up in his file ten years later. Again, this merely demonstrates the manner in which state officials have treated James Dean Walker over the years.

The matter of whether there was sufficient authentication of the transcript is a matter of law, given the authenticating testimony of Russell Kumpe and Paul McDonald. The district court concluded that the state-

ment did not create a reasonable doubt concerning Walker's guilt. As previously stated, however, the court of appeals had reviewed the entire record and was able to immediately see the importance of this document which would literally take the murder weapon out of James Dean Walker's hands. To the extent that the district court's findings could be otherwise, logic and legal analysis indicate that they are truly, clearly erroneous.

The State's reliance on *Anderson v. City of Bessemer*, —— U.S. ——, 105 S.Ct., 1504, 84 L.Ed.2d 518 (1985) is misplaced. This case defines the clearly erroneous standard thusly:

> ". . . a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . ." 84 L.Ed.2d at 528.

It is apparent from the close attention given by the Court of Appeals to the District Court's findings that this test was more than satisfied. In pertinent part, Judge Bright states:

> "Whether the ends of justice standard has been satisfied is a mixed question of fact and law, and it is within the discretion of the district court to make that determination. For the reasons discussed in the text, we hold that the district court abused its discretion in concluding that the ends of justice standard has not been satisfied in the circumstances of this case. Our holding is particularly appropriate in light of two factors. First, much of the existing record in this case—all of which must be weighed in the balance under the ends of justice standard—was not made before Judge Woods, and has been thoroughly and independently reviewed by this court. Second, Judge Woods' suggested theory of the crime (See *Ante*, at 954) contradicts the State's trial theory that Walker intentionally fired the first shot". 763 F.2d at 954-955. (Footnote 24).

The Court of Appeals has painstakingly reviewed the entire record. The opinion regarding the Kumpe-Eisner Transcript is supported by applicable Arkansas law regarding authentication as set forth in such opinion and is in line with the existing precedents of this court regarding suppression of evidence. The State contents itself with technical objections to authentication when it should be concerned about why a high ranking law enforcement official would not have revealed a clearly exculpatory statement. Again, justice is served by denying the petition for Writ of Certiorari.

CONCLUSION

The Court of Appeals has given James Dean Walker the opportunity for a trial before a fair and unbiased judge where all legal evidence, including that previously suppressed, may be presented. This is a basic right of an accused, and established guidelines of this Court were followed in the Eighth Circuit decision. Accordingly, the Petition for Certiorari should be denied.

Realizing that its petition does not present any issue worthy of the Court's review, the State requests "in the alternative" that the Court "hold this case" until it renders its decision in *Henderson v. Wilson*, No. 84-1479. That request should be denied. The issue presented in *Wilson* is fundamentally dissimilar to the issue presented here. *Wilson* presents the question, in the Sixth Amendment context, whether a federal court should reconsider its earlier denial of habeas relief on the ground that a subsequent decision by this Court indicates that the denial of relief was in error, and even though "the proof of guilt was nearly overwhelming." *Wilson v. Henderson*, 742 F.2d 741, 742 (2d Cir. 1984). Whatever policies in favor of repose may be implicated in such a situation, they do not obtain where, as here, the evidence of respondent's guilt is equivocal and contradictory, and there is newly discovered evidence suppressed by the State for

more than twenty years that, together with the trial judge's admitted bias, implicates the core concern of Fourteenth Amendment due process—the reliability and fairness of the fact-finding process itself.

Respectfully submitted,

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APPENDIX

LET OUR MANDATE ISSUE FORTHWITH.

ARNOLD, Circuit Judge, concurring.

Some of the arguments made in the dissenting opinion deserve, in my view, a brief comment.

1. The statement is made that "[t]he Court today frees James Dean Walker . . . ." *Post*, at 38. That is not at all what the Court is doing. We are simply holding that fundamental fairness, embodied in the Due Process Clause of the Fourteenth Amendment, requires a new trial. If Walker is ultimately freed, it will only be because he is acquitted by a jury, assuming that the state does not drop the matter on its own motion, which seems most unlikely.

2. I yield to no one in my conviction that the clearly-erroneous rule of Fed. R. Civ. P. 52 is central to the legitimate exercise of appellate power. The dissent charges that the Court is ignoring findings of fact by the District Court. Again, I must disagree. As our opinion recalling the mandate clearly stated, the District Court's duty was not to make its own findings of fact, using its own assessment of credibility, as in the ordinary case, but to make the lesser, threshold judgment whether the new evidence was sufficiently credible to deserve the attention of a jury. Except with respect to the Kumpe-Eisner conversation, we are not rejecting the District Court's findings of fact in the usual sense. Having read every page of the most recent transcript, as well as the earlier ones, I have no hesitation in joining the Court's opinion today.

3. The dissenting opinion quotes my statement in an earlier concurrence, *Walker v. Lockhart*, 726 F.2d 1238, 1250 (8th Cir. 1984) (concurring opinion), to the effect that the bias on the part of the trial judge had not been shown to have done Walker any actual harm that would

not have occurred if the case had been tried by another judge. That statement, of course, was made at a time when no newly discovered evidence was in the case. As I also stated in that concurrence, I believe this Court erred in 1969 when it initially rejected the claim of bias. This belief is based not on any assessment of actual prejudice, but rather on the view that everyone, whatever the evidence against him, is entitled to be tried before an impartial judge. Such a trial Walker has never had, and the newly discovered evidence that has now come into the case gives us the power, in order to attain the ends of justice, to reach and decide the bias question anew.

4. Our holding today benefits not only James Dean Walker. It benefits also all the people of Arkansas, who have a vital interest in the honor and fairness of their own courts. Walker, like anyone else accused of crime, should have a fair trial before an impartial judge. Unless and until he receives such a trial, he should not be deprived of his liberty.

With these additional comments, I join the Court's opinion in its entirety.